

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

7 || UNITED STATES OF AMERICA,

Plaintiff,
Defendant.

Case No. 2:11-cr-00312-MMD-PAL

ORDER

(Mtn to Strike - Dkt. #74)

VS.
ANIL MATHUR,

ANIL MATHUR,

Defendant. }

This matter is before the court on Defendant Anil Mathur's Motion to Strike Prejudicial

14 Surplusage from the Indictment (Dkt. #74). The court has considered the Motion, the government's
15 Response (Dkt. #90), and Mathur's Reply (Dkt. #91).

BACKGROUND

17 The grand jury returned an Indictment (Dkt. #1) against Defendant Mathur on August 23, 2011,
18 charging him with nine counts of paying illegal remunerations, in violation of 42 U.S.C. § 1320 a-
19 7b(b)(2)(A). The Indictment alleges Mathur offered kickbacks and bribes to a physician in exchange
20 for referrals of Medicare patients and contains forfeiture allegations. The first forfeiture allegation
21 seeks to recover \$6,000.00 in kickbacks or bribes allegedly paid by Mathur between July 30, 2010, and
22 December 7, 2010. The second forfeiture allegation seeks a monetary judgment in the amount of
23 \$14,347.68—the amount the government contends Medicare paid for services rendered after March 23,
24 2010, to Medicare patients referred by the physician receiving kickbacks or bribes.

DISCUSSION

26 As an initial matter, the court notes that Mathur certified that the Motion was timely filed, and
27 he references “Pacer document 53 filed on March 20, 2012.” Motion at 2, n.1. Mathur refers to his
28 Motion to Hold Pretrial Motion Deadline in Abeyance (Dkt. #53), which he filed on May 20, 2012,

1 nearly two weeks after the extended deadline for filing pretrial motions had run. *See Order on*
 2 *Stipulation* (Dkt. #39) (extending pretrial motion deadline until March 8, 2012). The court denied the
 3 Motion to Hold Pretrial Deadlines in Abeyance in an Order (Dkt. #99) entered June 22, 2012.
 4 Accordingly, despite Mathur's certification, the instant Motion was untimely. However, the court will
 5 nevertheless resolve the motion on the merits.

6 **I. The Parties' Positions.**

7 **A. Mathur's Motion to Strike (Dkt. #74).**

8 Mathur seeks an order pursuant to Rule 7(d) striking certain language from paragraph four of the
 9 Indictment (Dkt. #1), which provides,

10 The federal anti-kickback statute is codified at Title 42, United States Code,
 11 Section 1320a-7(b)b. Under the anti-kickback statute, among other things,
 12 it is illegal to knowingly and wilfully confer remuneration (anything of
 13 value), including any bribe, kickback or rebate, to any person, **if any one**
purpose of conferring remuneration is to induce that person to refer an
 individual for the furnishing of any item or service for which payment may
 be made under a Federal health care program such as Medicare.

14 *Id.* at 2:7-12 (emphasis added).

15 Mathur contends the bolded language above is prejudicial and should be stricken because it
 16 "significantly lowers the elements the government must prove to obtain a conviction in this case."
 17 Motion at 3:4-5. Mathur asserts the "one purpose" language is not contained in the charging statute, 42
 18 U.S.C. § 1320a-7b(b), and the government imported that language from the Third and Ninth Circuit's
 19 decisions in *United States v. Greber*, 760 F.2d 68, 72 (3d Cir. 1985) and *United States v. Kats*, 871 F.2d
 20 105, 108 (9th Cir. 1989). Both decisions held that a defendant could be convicted of a violation of the
 21 anti-kickback statute if "one purpose" of the remuneration is to induce or reward referrals of Federal
 22 health care program business. Mathur argues that in *United States v. Gaudin*, 515 U.S. 506 (1995), the
 23 Supreme Court overruled *Greber* holding that where a statute uses "knowingly and wilfully," the
 24 government must prove "materiality" as an element of the offense. Therefore, the "one purpose"
 25 language in the indictment reduces the government's burden of proof and "will allow the jury to convict
 26 Mr. Mathur for what may have been an incidental rather than material purpose in his own mind based
 27 upon the testimony of [the physician]." Motion at 5:17-20. Mathur asserts the bolded language should
 28 be replaced with "if *the* purpose of conferring remuneration...." Motion at 3:6-7.

1 **B. The Government's Response (Dkt. #90).**

2 The government responds that Mathur's Motion is premature and misplaced. Relying on the
3 Ninth Circuit's opinion in *United States v. Ramirez*, 710 F.2d 535, 544-45 (9th Cir. 1983), the
4 government argues that the purpose of Rule 7(d) of the Federal Rules of Criminal Procedure is to
5 protect a defendant from prejudicial or inflammatory allegations that are not relevant or material to the
6 charges. Mathur has not shown the "one purpose" language in paragraph four of the Indictment is
7 prejudicial, inflammatory, or immaterial. Instead, Mathur argues that the government's interpretation
8 of the anti-kickback statute is incorrect. A motion under Rule 7(d) to challenge its interpretation of the
9 anti-kickback statute is inappropriate and premature. The court need not decide whether the "one
10 purpose" test constitutes an element of the offense charged in the Indictment until after the close of
11 evidence. If the court refrains from reading the Indictment to the jury before the close of evidence,
12 paragraph four need not be edited or stricken now, and Mathur will suffer no prejudice. If it is the trial
13 judge's preference to read the Indictment to the jury and she later determines the "one purpose" test
14 does not apply, the court can disregard and delete that language in paragraph four of the Indictment.
15 The government's response does not address Mathur's arguments about the applicability of the "one
16 purpose" test or *Gaudin* but offers file a supplemental brief on the issue if the court requires.

17 **C. Mathur's Reply (Dkt. #91).**

18 In reply, Mathur asserts the "one purpose" language is obviously prejudicial because the
19 Indictment misstates the appropriate legal standard and contains language purporting to be an element
20 of the offense charged that is not included in the statutory language of 42 U.S.C. § 1320a-7b(b).
21 Mathur agrees hat the court should not read the Indictment to the jury or provide a copy of the
22 Indictment to the jury until the propriety of the "one purpose" test is decided. However, Mathur asserts
23 that the court should decide the applicability of the "one purpose" standard well before trial because
24 that decision will impact the way defense counsel prepares for trial.

25 **II. Analysis.**

26 Rule 7(d) of the Federal Rules of Criminal Procedure provides that the court "may strike
27 surplusage from the indictment." *Id.* It is intended to protect a criminal defendant against immaterial
28 or irrelevant allegations in an indictment which may be prejudicial. When the rule was adopted in

1 1944, the advisory committee noted that Rule 7(d) was intended to introduce a means of protecting a
2 criminal defendant against “immaterial or irrelevant allegations in an indictment or information, which
3 may, however, be prejudicial.” *Id.* A court’s authority to strike surplusage is limited to a defendant’s
4 motion in light of the Supreme Court’s holding in *Ex Parte Bain*, 121 U.S. 1, 12 (1887), *overruled on*
5 *other grounds by United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (the constitutional guaranty of
6 an indictment by a grand jury implies that the indictment may not be amended, and in making a motion
7 under Rule 7(d), a defendant waives this right). *See* Fed.R.Crim.P. 7(d) advisory committee’s note.

8 A motion to strike surplusage is directed to the sound discretion of the trial court. *United States*
9 *v. Terrigno*, 838 F.2d 371, 373 (9th Cir. 1988). It should only be granted where the disputed allegations
10 are prejudicial or inflammatory and not relevant or material to the charges. *Id.* (citing *United States v.*
11 *Ramirez*, 710 F.2d 535, 544-46 (9th Cir. 1983)). For example, Rule 7(d) has been used to strike an
12 alias from indictments where the alias was not relevant to the issue of defendant’s identification.
13 *Ramirez*, 710 F.2d at 545 (citing *United States v. Wilkerson*, 456 F.2d 57 (6th Cir.), *cert. denied*, 408
14 U.S. 926 (1972)). It has also been used to strike prejudicial language in an indictment describing a
15 defendant’s prior felony conviction for carrying a handgun where the defendant was charged with
16 possession of a firearm by a previously-convicted felon. *Id.* (citing *United States v. Poore*, 594 F.2d 39,
17 41 (4th Cir. 1979)).

18 The issue here concerns the court’s determination of the elements of a 42 U.S.C. § 1320a-7b(b)
19 offense. Mathur agrees that additional briefing can be provided to decide whether the “one purpose”
20 cases apply to this prosecution. However, he argues that the court should decide the issue pre-trial
21 rather than after the close of evidence. *Greber* and *Kats* were both decisions that involved convictions
22 under the anti-kickback statute. By contrast, *Gaudin* involved a conviction for making material false
23 statements to a government agency under 18 U.S.C. § 1001. The question presented to the Supreme
24 Court in *Gaudin* was whether the trial court should have submitted the question of the materiality of
25 the false statements to the jury. Both sides in *Gaudin* agreed that the materiality of the false statements
26 was an element of the offense charged. They disagreed whether the issue of materiality was a legal
27 question for the court to decide or a factual question for the jury to decide. The Supreme Court held the
28 issue of materiality should have been submitted to the jury. The decision did not discuss or decide the

1 "knowingly and wilfully" element of the offense charged, so it is far from clear how Mathur claims
2 *Gaudin* overruled the "one purpose" holdings of *Greber* and *Kats*.

3 As Mathur concedes additional briefing is required on the issue of whether the "one purpose"
4 rule remains good law after *Gaudin*, the court finds this issue is best reserved for the jury instruction
5 phase after the evidence has been presented. Both sides agree that the disputed language in paragraph
6 four of the Indictment should not be read to the jury. If this language is not read to the jury, Mathur will
7 not be prejudiced if the trial judge ultimately agrees that the "one purpose" rule is no longer good law
8 after *Gaudin*.

9 The trial judge has entered an Order Regarding Trial (Dkt. #111) requiring counsel to submit
10 their proposed jury instructions and trial memoranda the week before trial. Both sides will therefore be
11 afforded an opportunity before trial to state their respective positions on how the jury should be charged
12 and to provide the court with any authority supporting their requested instructions. The court's
13 instructions will charge the jury on the elements of the offense the government must prove, ensuring the
14 instructions require the government to satisfy its burden of proof and present the defendant's theory.
15 See, e.g., *United States v. Somsamouth*, 352 F.3d 1271, 1274 (9th Cir. 2003) (whether a district court's
16 instructions fairly and adequately covered the elements of the offense is reviewed for abuse of
17 discretion; whether a district court's instructions presented the defendant's theory of the case reviewed
18 de novo).

19 For these reasons,

20 **IT IS ORDERED** that Mathur's Motion to Strike Prejudicial Surplusage from the Indictment
21 (Dkt. #74) is DENIED.

22 Dated this 4th day of September, 2012.

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25 
PEGGY A. TEER
26 UNITED STATES MAGISTRATE JUDGE
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